Supreme Court, U.S.
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91-1587

No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

ANTHONY JEROME TONEY,

Petitioner,

v.

THE STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE PETITIONER WAS DENIED DUE PROCESS BY THE TRIAL COURT FAILING TO INFORM HIM OF THE RANGE OF PUNISHMENT?

2. WHETHER THE PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION BY THE TRIAL COURT'S ACCEPTANCE OF THE "IRELAND FORM" EXECUTED BY THE PETITIONER/DEFENDANT, WHEN THE MAXIMUM RANGE OF PUNISHMENT WAS LIFE AND NOT "TWENTY YEARS" AS THE FORM INDICATED?

3. WHETHER THE PETITIONER WAS DENIED DUE PROCESS BY THE COURT'S ACCEPTANCE OF THE PETITIONER/DEFENDANT'S GUILTY PLEA WHEN NO FACTUAL BASIS FOR THE PLEA EXISTED ON THE RECORD?

4. WHETHER THE PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION BY THE TRIAL COURT IN SENTENCING THE DEFENDANT TO THE MANDATORY FIVE YEARS INCARCERATION PURSUANT TO TITLE 13A-12-250, WHEN NO FACTUAL BASIS FOR THE ENHANCEMENT WAS PROVEN?

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OCTOBER TERM, 1991

ANTHONY JEROME TONEY,

Petitioner,

v.

THE STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

Petitioner[1] respectfully prays that a Writ of Certiorari issue to review the Judgment of the Alabama Supreme Court on December 13, 1991, previously affirmed *without opinion* by the Alabama Court of Criminal Appeals by Judgment on August 23, 1991.

OPINIONS BELOW

Petitioner timely appealed his conviction and sentence to the Alabama Court of Criminal Appeals. By Judgment of Au-

[1] Petitioner's undersigned counsel respectfully submits that to the best of her knowledge, the style of this case accurately reflects all parties having an interest in its outcome.

gust 23, 1991, the Alabama Court of Criminal Appeals affirmed the Petitioner's conviction and sentence without an opinion. The Petitioner timely filed an Application For Rehearing and 39(k) Motion in the Alabama Court of Criminal Appeals. This Application For Rehearing and 39(k) Motion was denied without opinion by the Alabama Court of Criminal Appeals on September 20, 1991.

Petitioner timely filed a Petition For Writ Of Certiorari and Brief in Support in the Supreme Court of Alabama to review the Judgment of the Alabama Court of Criminal Appeals. The Alabama Supreme Court by order of December 13, 1991, denied the Petition For Writ of Certiorari.

Petitioner timely filed a Motion To Stay The Certificate Of Judgment Pending Appeal with the Alabama Supreme Court. The Alabama Supreme Court by order of January 2, 1992, denied Petitioner's Motion. Petitioner then timely filed a Motion To Stay The Certificate Of Judgment with the Supreme Court of United States of America. The United States Supreme Court by order of January 29, 1992, denied Petitioner's Motion.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 *U.S.C.*, Section 1257(a). This Petition was timely filed within ninety days of the date of the Alabama Supreme Court's Judgment and Order of December 13, 1991.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution provides in pertinent part:

> [No person] shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

STATEMENT OF THE CASE

The Defendant, Anthony Jerome Toney, was charged in a two count indictment with the offenses of Trafficking in Cocaine in violation of Section 13A-12-231 of the *Alabama Criminal Code*, and Unlawful Possession of Cocaine in violation of Section 13A-12-212(a)(1) of the *Alabama Criminal Code*. He was represented in the Circuit Court of Jefferson County by the Honorable Anthony M. Falletta. On October 1, 1990, the De-

fendant entered a guilty plea to the charge of Trafficking in Cocaine and was sentenced by the Honorable James S. Garrett to ten years in the penitentiary. The case was continued for a Probation Hearing. On October 3, 1990, the State filed a "Motion for Sentence Pursuant to Section 13A-12-250" of the *Code of Alabama* (1975). On January 11, 1991, the Defendant's sentence was imposed as follows: he was to serve five years in the penitentiary, pursuant to 13A-12-231, the trafficking section of the *Code of Alabama*, (1975). In addition, he was sentenced to five years, pursuant to 13A-12-250, the "Schoolyard Statute" of the *Code of Alabama*, (1975). On that day he gave oral Notice of Appeal, and his bond was set at Three Thousand Dollars ($3000). The Defendant was declared indigent, and on April 26, 1991, Tamera K. Erskine was appointed to represent Toney on appeal.

The issue was then properly brought before the Alabama Court of Criminal Appeals in Mr. Toney's original Brief, Reply Brief, and Application For Rehearing and 39(k) Motion. In Mr. Toney's original Brief, these issues were presented in the Argument, Issues One through Five (Appendix hereto), and in the Application For Rehearing and 39(k) Motion at Arguments A and B (Appendix hereto). The Court of Criminal Appeals never issued an opinion on these questions, and they were properly brought before the Alabama Supreme Court in Mr. Toney's Petition For Writ of Certiorari at Section A (Appendix hereto). The Supreme Court of Alabama denied the Petitioner's Writ of Certiorari without an opinion.

REASONS FOR GRANTING THE WRIT

I. Whether The Petitioner Was Denied Due Process Under The Fifth Amendment To The United States Constitution Due To The Failure Of The Trial Court To Inform The Petitioner Of The Correct Range Of Punishment.

The Petitioner submits that the record is clear that he was deprived of due process and equal protection of the law, throughout the course of the proceedings against him.

At no time during the colloquy did the trial court inform the Defendant of the range of punishment. In *Carter v. State*, 277 So. 2d 896 (Ala. 1973) the Alabama Supreme Court held, "[t]he Defendant, prior to pleading guilty, must be advised *on the record* of the maximum and minimum potential punishment for his crime." In *Carter, supra*, a judgment entry showed that the Defendant pled guilty to the charge of kidnapping. He said he understood the "penalties involved," but there was no evidence of any further explanation of his rights, and hence, his guilty plea was not "intelligent and voluntary," even though he understood the "penalties involved." The Alabama Supreme Court reversed and remanded the case because the Defendant's statement that he knew the "penalties involved" was ineffective when the exact nature of those penalties was not stated on the face of the record. The same is true in this case; at no time did the trial court, on the record, state the minimum and maximum range of punishment that the Defendant would be subjected to.

A. *Petitioner Was Denied Due Process Under The Fifth Amendment To The United States Constitution Due To The Failure Of The Trial Court To Inform The Petitioner Of The Correct Range Of Punishment.*

1. *Facts*

On October 1, 1990, the Defendant, Anthony Jerome Toney, withdrew his plea of not guilty and entered a plea of guilty before the Honorable James S. Garrett, Circuit Judge in and for Jefferson County, Alabama. Also present was Mr. Toney's attorney, the Honorable Anthony M. Falletta and Deputy District Attorney, Tammy Montgomery, representing the State. At the plea, the following colloquy was had:

> THE COURT: Mr. Toney, before we go forward with the plea in this case I want too ask you some questions about the form that I have here in my hand.

Now, this form is what is known as Court's Exhibit A. This Court's Exhibit A sets out and explains to you your constitutional rights that are guaranteed to you under the constitution of the state [sic] of Alabama and the constitution [sic] of the United State. Has your attorney, Mr. Falletta, gone over these rights that are set out and explained on this form and explained them to you, sir?

A Yes, sir.

THE COURT: Do you have any questions you would like to ask me about any of these rights that are set out and explained on this form?

A No, sir.

THE COURT: Is this your signature at the bottom of this form?

A Yes, sir.

THE CORUT [sic]: At the time that you signed this form did you understand these rights as your attorney, Mr. Falletta, explained them to you, sir?

A Yes, sir.

THE COURT: Mr. Falletta, at the time you went over these rights with Mr. Toney, in your opinion did he have full understanding of these rights as you explained them to him?

MR. FALLETTA: Yes, sir.

THE COURT: Do you recommend we go forward with this plea in this case?

MR. FALLETTA: Yes, sir.

THE COURT: Mr. Toney, the charge that is against you at this time is the result of a grand jury indictment that was returned against you by the March 1990 grand jury. It alleges in a two count indictment the offense of trafficking in cocaine. And there is also another offense of possession of cocaine.

But the first count alleges that you did knowingly and unlawfully sell or deliver to Mark Metcalf twenty-eight grams or more of cocaine or a mixture containing cocaine, a controlled substance, on November the 3rd, of 1989 in violation of Section 13A-12-231 of the Alabama Criminal Code.

The second count of the indictment alleges that you did unlawfully possess two point one seven three grams of powder compressed material containing cocaine, in violation of Section 13A-12-212(a)(1) of the Alabama Criminal Code. Do you understand the nature of this charge and do you know what this case is about, sir?

A Yes, sir.

THE COURT: All right. To the offense of trafficking in cocaine as charged in the indictment, to that charge how do you plea[]?

A Guilty.

THE COURT: On your plea of guilty the Court does find you guilty, and I'll ask at this time if you have anything to say as why sentence should not be pronounced against you?

A No, sir.

THE COURT: All right. I'm going to — judgment and sentence of the Court you be imprisoned in the penitentiary for a term of ten years. It's further ordered that you be credited with any and all time spent incarcerated pending trial of this cause unless you were serving time for another offense.

It's further ordered that you pay a fine in the amount of fifty dollars to the Alabama Crime Victim's Compensation Commission. I know that there is another fine that will be accessed [sic] later on, but I'm going to order this for a probation report on November the 30th, 1990 at 8:30. And I'll

continue on the same bond pending the hearing at that time.

Now, this form here is what is known as Court's Exhibit B. And this Court's Exhibit B asks these five questions, and it shows that there have been responses to these questions. Did you respond to these questions as shown by the check marks?

A Yes, sir.

THE COURT: Now, this form indicates that you are satisfied with the representation given to you by Mr. Falletta in representing you in this case, is that correct?

A Yes, sir.

THE COURT: All right. See y'all back on November the 30th. All right.

END OF PROCEEDINGS

2. *Deprivation Of Due Process And Equal Protection By The Trial Court's Failure To Inform The Petitioner Of The Correct Range Of Punishment.*

In *McNalley v. State,* 468 So. 2d 209 (Ala.Crim.App. 1985), the Court of Criminal Appeals held that "[t]he colloquy between the trial court and the Defendant was insufficient" and the Defendant's guilty plea was, therefore, "not intelligently and voluntarily entered." The transcript of the guilty plea revealed a very limited colloquy which took place between the trial judge and the Appellant. The indictment was read to him, he was informed that he had a right to a jury trial and that the State must prove guilt beyond a reasonable doubt, and that he had a right to testify in his own behalf or decline to take the stand and testify. The Court of Criminal Appeals, citing *Carter, supra,* stated that "a Defendant must be informed of the maximum and minimum possible sentences as an absolute constitutional prerequisite to the acceptance of a guilty plea." The Court of Criminal Appeals found that the colloquy

between the trial court and the Appellant was insufficient, and reversed the case.

Swain v. State, 485 So. 2d 1252 (Ala.Crim.App. 1986) is a case with an identical holding. In *Swain, supra,* the Court of Criminal Appeals held that "because the trial court did not correctly inform the Appellant of the permissible range of punishment prior to the acceptance of the plea, we reverse and remand." The Court, citing *Pratte v. State,* 448 So. 2d 502, 504 (Ala.Crim.App. 1984) stated "[s]ince knowledge of the range of possible penalties plays an important part in an accused's decision whether or not to plead guilty, the maximum and minimum sentences should be treated with reasonable precision." The record in *Swain, supra* shows that the trial court informed the Appellant that the permissible range of punishment for the offense would be a term of imprisonment "for not less than one nor more than ten years." This range of punishment was incorrect since the Appellate was treated as a Habitual Offender under the Alabama Habitual Felony Offender Act. The trial court had a duty, not only to inform the Appellant of the range of punishment, but to inform him of the proper range of punishment, which it did not do.

II. Whether The Petitioner Was Denied Due Process And Equal Protection By The Trial Court's Acceptance Of The "Ireland Form" Executed By The Defendant, When The Maximum Range of Punishment Was Life And Not "Twenty Years" As The Form Indicated.

The Petitioner executed an "Ireland Form" or "Court's Exhibit A". The form, however, incorrectly cited the range of punishment and the trial court accepted the form without correcting it or informing the Defendant of the correct range of punishment. It is clear then, both from the form and from the record, that the Defendant did not knowingly and intelligently enter into the plea.

A *The Petitioner Was Denied Due Process And Equal Protection By The Trial Court's Acceptance Of The "Ireland Form" Executed By The Defendant, When The Maximum Range of Punishment Was Life And Not "Twenty Years" As The Form Indicated.*

1. *Facts*

On September 30, 1990, the Appellant, Anthony Toney, executed an "Ireland Form", also known as "Court's Exhibit A". The Ireland Form, *Ireland v. State,* 47 Ala. App. 65, 250 So. 2d 602 (1971) quotes in pertinent part:

> TO THE ABOVE NAMED DEFENDANT: This is to inform you of your rights as a Defendant in this criminal case. Under the indictment returned against you in this case by the Grand Jury of Jefferson County, Alabama, you are charged with the crime of Trafficking Cocaine which is a felony offense. In the event you plead guilty to said crime or if the jury finds that you are guilty of said crime, the law provides for punishment by imprisonment in the penitentiary for not less than three nor more than twenty for such offices." (CR-33)

The Defendant's attorney, Anthony M. Falletta, and the Honorable James S. Garrett, Circuit Judge, also signed this form.

2. *Deprivation Of Due Process And Equal Protection By The Trial Court's Acceptance Of The "Ireland Form" Executed By The Defendant, When The Maximum Range of Punishment Was Life And Not "Twenty Years" As The Form Indicated.*

In *Cooper v. State,* 297 So. 2d 169 (Ala.Crim.App. 1973), the Court of Criminal Appeals stated "the so-called Ireland Waiver Form is a useful document as it memorializes what occurred at the guilty plea hearing and we commend its use. But a guilty plea should not rest alone on the execution of a written form. There *must* be a personal interrogation by the trial judge and a record made of the Defendant's responses to the judge's inquiry. . . . [t]here is no adequate substitute for demonstrating

in the record at the time the plea is entered the Defendant's understanding of the nature of the charge against him and the consequence the plea connotes."

The Defendant was charged in the indictment with Trafficking in Cocaine, in violation of Section 13A-12-231 of the Alabama Criminal Code (1975). The indictment states in pertinent part: "Anthony Jerome Toney, alias Tony Toney, whose name is to the Grand Jury otherwise unknown, did knowingly and unlawfully sell or deliver to Mark Metcalf, 28 grams or more of cocaine or of a mixture containing cocaine, a controlled substance, on November 3, 1989, in violation of Section 13A-12-231 of the Alabama Criminal Code." Section 13A-12-231(2) states, "[a]ny person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine or of any mixture containing cocaine, described in Section 20-2-25(1), is guilty of a felony, which felony shall be known as 'Trafficking in Cocaine.' If the quantity involved: a. is 20 grams or more, but less than 500 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of Fifty Thousand Dollars ($50,000.00)." No maximum range of punishment is set out in 13A-12-231. However, in the commentary to that Section, several comments regarding the maximum punishment are laid out. In *Robinson v. State*, 474 So. 2d 685 (Ala. 1985), the Supreme Court held that "even though this Section provides only for a minimum term of imprisonment, the statute may reasonably be construed to validly authorize a maximum sentence of life imprisonment." It is clear then that the range of punishment, as set out in the Appellant's Court's Exhibit A is incorrect; the maximum is not twenty years but is, in fact, life. Toney's plea, therefore, was not knowingly and voluntarily entered into. In *Swain, supra*, the Appellant argued that her plea was not "knowingly and voluntarily" entered because she was not informed of the maximum sentence she would be called upon to serve. In *Swain, supra*, the Ireland

Form that the Appellant executed showed that the maximum sentence would be ten years. However, the Appellant was a habitual felony offender, and therefore, the ten year maximum was incorrect. The Court held that the failure to inform the Defendant of the maximum sentence she could receive as a result of her guilty plea, rendered her plea involuntary and the case was reversed and remanded.

In *Johnson v. State*, 535 So. 2d 191 (Ala.Crim.App. 1985), the Ireland Form indicated that the range of punishment would be from ninety-nine years or life to not less that ten years. However, because a firearm or pistol was involved in this case, the Appellant's sentence should have read "not less than twenty years." The Court of Criminal Appeals, again, remanded the case for a correct determination. In *McNalley, supra*, the Court of Criminal Appeals found that the Defendant's guilty plea was not intelligently and voluntarily entered. In that case, the Ireland Form was not executed by the Defendant or his counsel. Even though it was unexecuted and could not be considered by the appellate court, it incorrectly listed the range of punishment as being "life" and not "life or not more than ninety-nine years."

The Court, citing *Carter, supra*, held that a "Defendant must be informed of maximum and minimum possible sentences as an absolute constitutional prerequisite to acceptance of a guilty plea." *Carter, supra* more fully set out in Issue One of this Brief, stood for the proposition that prior to pleading guilty a Defendant must be advised, on the record, of the maximum and minimum potential punishment for his crime. *Carter, supra* went on to state that "the 'utmost solicitude' required by *Boykin v. Alabama*, 89 S.Ct. 1709 (1969) requires a showing not only that the Defendant believed he know the range of punishment, but that his belief was accurate. The better practice is to elicit the maximum and minimum sentences from the Defendant himself, so that his knowledge thereof appears on the face of the record."

It is clear from all of these cases that Toney did not knowingly and intelligently enter into a guilty plea, because he was

misinformed of the maximum possible punishment he could receive for Trafficking in Cocaine. Not only was the Ireland Form incorrect, but the trial judge never informed him of the range of punishment and never corrected the Ireland Form in any way.

III. Whether The Petitioner Was Denied Due Process By The Court's Acceptance Of The Petitioner's Guilty Plea When No Factual Basis For The Plea Existed On The Record.

It is clear that at no time was a factual basis for the plea laid out. The trial judge did not ask Mr. Toney what conduct he had participated in which led to his arrest and conviction, nor did the trial judge elicit from the State the factual basis upon which this plea rested. The trial court erred in not requesting this information, and the Defendant's guilty plea was not knowingly and intelligently entered into.

A. *Petitioner Was Denied Due Process By The Court's Acceptance Of The Petitioner's Guilty Plea When No Factual Basis For The Plea Existed On The Record.*

1. *Facts*

Mr. Toney pled guilty on October 1, 1990, and at that time the following colloquy took place:

> THE COURT: Mr. Toney, before we go forward with the plea in this case I want too ask you some questions about the form that I have here in my hand.
>
> Now, this form is what is known as Court's Exhibit A. This Court's Exhibit A sets out and explains to you your constitutional rights that are guaranteed to you under the constitution of the state [sic] of Alabama and the constitution [sic] of the United State. Has your attorney, Mr. Falletta, gone over these rights that are set out and explained on this form and explained them to you, sir?

A Yes, sir.

THE COURT: Do you have any questions you would like to ask me about any of these rights that are set out and explained on this form?

A No, sir.

THE COURT: Is this your signature at the bottom of this form?

A Yes, sir.

THE CORUT [sic]: At the time that you signed this form did you understand these rights as your attorney, Mr. Falletta, explained them to you, sir?

A Yes, sir.

THE COURT: Mr. Falletta, at the time you went over these rights with Mr. Toney, in your opinion did he have full understanding of these rights as you explained them to him?

MR. FALLETTA: Yes, sir.

THE COURT: Do you recommend we go forward with this plea in this case?

MR. FALLETTA: Yes, sir.

THE COURT: Mr. Toney, the charge that is against you at this time is the result of a grand jury indictment that was returned against you by the March 1990 grand jury. It alleges in a two count indictment the offense of trafficking in cocaine. And there is also another offense of possession of cocaine.

But the first count alleges that you did knowingly and unlawfully sell or deliver to Mark Metcalf twenty-eight grams or more of cocaine or a mixture containing cocaine, a controlled substance, on November the 3rd, of 1989 in violation of Section 13A-12-231 of the Alabama Criminal Code.

The second count of the indictment alleges that you did unlawfully possess two point one seven three grams of powder compressed material

containing cocaine, in violation of Section 13A-12-212(a)(1) of the Alabama Criminal Code. Do you understand the nature of this charge and do you know what this case is about, sir?

A Yes, sir.

THE COURT: All right. To the offense of trafficking in cocaine as charged in the indictment, to that charge how do you plea[]?

A Guilty.

THE COURT: On your plea of guilty the Court does find you guilty, and I'll ask at this time if you have anything to say as why sentence should not be pronounced against you?

A No, sir.

THE COURT: All right. I'm going to — judgment and sentence of the Court you be imprisoned in the penitentiary for a term of ten years. It's further ordered that you be credited with any and all time spent incarcerated pending trial of this cause unless you were serving time for another offense.

It's further ordered that you pay a fine in the amount of fifty dollars to the Alabama Crime Victim's Compensation Commission. I know that there is another fine that will be accessed [sic] later on, but I'm going to order this for a probation report on November the 30th, 1990 at 8:30. And I'll continue on the same bond pending the hearing at that time.

Now, this form here is what is known as Court's Exhibit B. And this Court's Exhibit B asks these five questions, and it shows that there have been responses to these questions. Did you respond to these questions as shown by the check marks?

A Yes, sir.

THE COURT: Now, this form indicated that you are satisfied with the representation given to

you by Mr. Falletta in representing you in this case, is that correct?

A Yes, sir.

THE COURT: All right. See y'all back on November the 30th. All right.

END OF PROCEEDINGS

2. *Deprivation Of Due Process By The Court's Acceptance Of The Petitioner's Guilty Plea When No Factual Basis For The Plea Existed On The Record.*

In *Cooper, supra* the Court of Criminal Appeals state that "there must be a personal interrogation by the trial judge and a record made of the Defendant's responses to the judge's inquiries on an entry of plea of guilty and there is no substitute for demonstrating in the record at the time the plea is entered the Defendant's understanding of the nature of the charge against him and the consequence his plea connotes." The *Cooper, supra* case sets out an appendix which is a suggested inquiry that the trial judge should follow. The suggested colloquy is as follows:

BY THE COURT: Before the Court accepts your plea let me ask you some questions.

Q. Have you had an opportunity to discuss this case with your Attorney?

DEFENDANT'S ANSWER.

Q. Have you explained to your Attorney the facts of this case and what your involvement in this case was?

DEFENDANT'S ANSWER.

Q. Do you understand that you were charged in the indictment with _____ ?

DEFENDANT'S ANSWER.

Q. Do you understand that punishment for this offense is _____ to _____ years?

DEFENDANT'S ANSWER.

Q. Do you understand that is you tell me you are guilty today and your plea is accepted that it will be my duty as Judge of this Court, to set your punishment within those limits, that is between _____ and _____ years?

DEFENDANT'S ANSWER.

Q. Would you like the indictment re-read to you or futher [sic] explained to you?

DEFENDANT'S ANSWER.

Q. Do you understand that you have the right to enter a plea of not guilty and have a jury trial today if you want one?

DEFENDANT'S ANSWER.

Q. Do you understand in that event, a jury composed [ ] twelve citizens from this County would be impaneled to determine your guilty or innocence in this case?

DEFENDANT'S ANSWER.

Q. And do you also understand that at such trial you would have the right to see, hear, question and confront any witness the State might present against you?

DEFENDANT'S ANSWER.

Q. And that you would have the right to cross-examine such witnesses?

DEFENDANT'S ANSWER.

Q. Do you understand that you have the right to call into Court or subpoena into Court any witness you wish to testify in your behalf?

DEFENDANT'S ANSWER.

Q. And you could testify at your trial, but you would not have to if you choose not to?

DEFENDANT'S ANSWER.

Q. Do you understand that the lawyer now representing you will represent you throughout the trial and after the trial if necessary, or that you may have another lawyer of your own choice?

DEFENDANT'S ANSWER.

Q. Do you also understand that you have the right to plead guilty?

DEFENDANT'S ANSWER.

Q. Do you understand that if you say you are guilty here today and your plea is accepted, that you will be giving up all those rights?

DEFENDANT'S ANSWER.

Q. Do you understand that if you tell me you are guilty and your plea is accepted that I might not set your sentence until I have had an opportunity to review your past record based on a presentence investigation report prepared by the State Probation and Parole Officer?

DEFENDANT'S ANSWER.

Q. Has anybody promised to reward you or any member of your family or anybody else to get you to say you are guilty?

DEFENDANT'S ANSWER.

Q. Has anybody told you that you would receive a lighter sentence, a particular sentence, or probation or any other favor to get you to say you are guilty?

DEFENDANT'S ANSWER.

Q. Tell the Court how you plead to the indictment or charge in this case.

DEFENDANT'S ANSWER.

Q. Tell me what happened in this case. You see, I don't know any of the facts. Just tell me what happened.

DEFENDANT'S ANSWER.

AND THE COURT ADDRESSED THE DEFENDANT'S ATTORNEY.

Q. Have you conferred with and advised the Defendant concerning the facts of this case and his rights in this case?

DEFENDANT'S ATTORNEY'S ANSWER.

Q. Do you recommend that the Court accept a plea of guilty by the Defendant?

DEFENDANT'S ATTORNEY'S ANSWER.

The limited colloquy set out by the trial judge in this case is very different from that suggested by *Cooper, supra.*"

Clark v. State, 318 So. 2d 896 (Ala. 1973) furthered the Court of Criminal Appeals' view. In *Clark, supra*, the Alabama Supreme Court was even more direct. "In a plea of guilty proceedings, the Judge should undertake a factual inquiry to determine if the plea is voluntarily made with an understanding of the nature of the charge and the consequences of the plea. *Further, the Judge should be satisfied that there is a factual basis for the plea.* (emphasis added) In this case, no factual basis for the plea existed on the record, either by the State or by the Defendant. Toney's guilty plea is, therefore, void and in violation of due process. There is no factual basis from which the trial judge could have determined that the guilty plea was knowingly and voluntarily entered. The procedure followed by the trial court is directly contrary to that suggested in *Cooper, supra* and *Clark, supra.*

In *McNalley, supra* the Court of Criminal Appeals again held that the Defendant's plea was not voluntarily and intelligently entered into. In *McNalley, supra* the Court of Criminal Appeals cited *Tuyman v. State*, 293 Ala. 75, 300 So. 2d 124 (1974). In *Tuyman, supra* the Alabama Supreme Court held, "[a] guilty plea to be intelligently and voluntarily entered when the Ireland Form is executed and signed by a Defendant and acknowledged by the signature of the defense counsel and Circuit Judge, *provided there is other evidence in the record supporting that fact.*"

It is clear from all of these cases that the limited colloquy had between the trial judge and the Defendant was inadequate to lay out a factual basis upon which the judge could determine that the Defendant was knowingly and intelligently entering into a guilty plea. The colloquy falls below the standards of *Cooper, supra* and the Defendant's plea is void.

IV. The Petitioner Was Denied Due Process And Equal Protection By The Trial Court In Sentencing The Petitioner To The Mandatory Five Years Incarceration, Pursuant To Title 13A-12-250, When No Factual Basis For The Enhancement Was Proven.

Section 13A-12-250 of the *Code of Alabama* states:

> In addition to any penalties heretofore or hereafter provided by law for any person convicted of an unlawful sale of a controlled substance, there is hereby imposed a penalty of five years incarceration in the state corrections facility with no provision for probation if the sight of such unlawful sale was on the campus or within a three mile radius of the campus boundaries of any public or private school, college, university, or other educational institution in this state.

There is no stipulation in the record that the Defendant and the State agreed that the sight of the sale was within three miles of a school. In addition, the trial court never required the State to prove that the sight of the alleged offense was within three miles of a school. At neither the Plea nor the Sentencing Hearing was any factual basis laid out to prove that the sales took place within three miles of the school. It was, therefore, error for the trial court to impose the enhanced sentence without facts upon which to base it.

A. *The Petitioner Was Denied Due Process And Equal Protection By The Trial Court In Sentencing The Petitioner To The Mandatory Five Years Incarceration, Pursuant To Title 13A-12-250, When No Factual Basis For The Enhancement Was Proven.*

1. *Facts*

On October 1, 1990, the Appellant pled guilty to Trafficking in Cocaine. On October 3, 1990, the State filed a Motion for the sentence to be enhanced, pursuant to Section 13A-12-250, *Code of Alabama* (1975). In the Motion, the State alleged that the sight of the alleged sale took place within three miles of Homewood Middle School. (CR-36 through CR-37) On January 14, 1991, the Court sentenced the Defendant to ten years in the penitentiary, five years mandatory under the Trafficking statute, and five years mandatory under the Schoolyard Statute.

2. *Deprivation Of Denied Due Process And Equal Protection By The Trial Court In Sentencing The Petitioner To The Mandatory Five Years Incarceration, Pursuant To Title 13A-12-250, When No Factual Basis For The Enhancement Was Proven.*

As this Court has stated in *Lane v. State,* 564 So. 2d 90 (Ala.Crim.App. 1990), "[t]he burden is on the State to present sufficient evidence that the accused is guilty of the charged crime." City *Moore v. State,* 474 So. 2d 190 (Ala.Crim.App. 1985) In the case at bar, no evidence was presented to show that the transaction took place within three miles of a school, nor is there a stipulation in the record to show such. The trial court erred in not having a factual basis upon which to impose this sentence enhancement.

In addition to the above Argument, the Appellant directs this Honorable Court's attention to the argument made in Issue Three regarding the necessity for a factual basis before a plea can be taken. In this case, it is clear that no factual basis existed on the record, or was stipulated to, by which the trial judge could enhance the sentence imposed upon Toney.

CONCLUSION

For these reasons, both separately and severally, and to prevent a miscarriage of justice, Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Alabama Supreme Court.

Respectfully submitted,

Tamera K. Erskine
Luker, Brewer, Shores, Umstead,
Erskine & Bramer
Barrister Hall
2205 Morris Avenue
Birmingham, Alabama 35203
(205) 251-6666

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has been served upon the Attorney General for the State of Alabama, via United States Mail, postage prepaid and properly affixed this the _____ day of March, 1992.

Tamera K. Erskine

No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

ANTHONY JEROME TONEY,

Petitioner,

v.

THE STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

TAMERA K. ERSKINE
Luker, Brewer, Shores, Umstead,
Erskine & Bramer
2205 Morris Avenue
Birmingham, Alabama 35203
(205) 251-6666

Attorney for Petitioner Toney

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THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

December 13, 1991

1910015

Ex parte Anthony Jerome Toney

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Anthony Jerome Toney v. State)

(CCA 90-627 (Jefferson CC-90-1091))

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

SHORES, J. — Hornsby, CJ., Maddox, Houston and Steagall, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appeal(s) of record in said Court.

Witness my hand this 13 day of Dec. 1991.

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING, 445 DEXTER AVENUE
MONTGOMERY 36130

JOHN PATTERSON
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
SAM TAYLOR
H. WARD McMILLAN
Judges

Clerk's Office
(205) 242-4590

Court of Criminal Appeals No. 90-627
(Jefferson Circuit Court No. 90-1091)

Anthony Jerome Toney
Appellant

vs.

State of Alabama
Appellee

Dear Sir or Madam:

You are hereby notified that on September 20, 1991, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing overruled. Rule 39(k) motion denied. No opinion.

LANE W. MANN
CLERK
COURT OF CRIMINAL APPEALS

LWM:kl

Hon. Tamera Erskine
2205 Morris Avenue
Birmingham, AL 35203

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING, 445 DEXTER AVENUE
MONTGOMERY 36130

JOHN PATTERSON
Presiding Judge
JOHN C. TYSON, III
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H. WARD McMILLAN
Judges

Clerk's Office
(205)242-4590

RELEASED
AUG 21991
CLERK
ALA COURT
CRIMINAL APPEALS

CR-90-627

Jefferson Circuit Court
(CC-90-1091)

Anthony Jerome Toney v. State

Affirmed by memorandum. The appellant's asserted errors of failing to inform him of the possible range of punishment, acceptance of the guilty plea with a sufficient factual basis, improper use of the "Ireland Form" in accepting the guilty plea, and no factual basis for sentence enhancement have not been properly preserved for appellate review because appellant had not made any objection to the sentencing at the trial. *Phillips v. State*, 518 So. 2d 833 (Ala. Cr. App. 1987); *Willis v. State*, 500 So. 2d 1324 (Ala. Cr. App. 1986). As to the constitutional issue raised, this Court has held in a number of cases that a constitutional issue must be raised at trial to be considered on appeal. *Lane v. State*, 564 So. 2d 90 (Ala. Cr. App. 1990); *Johnson v. State*, 480 So. 2d 13 (Ala. Cr. App. 1985).

IN THE SUPREME COURT OF ALABAMA
S. C. NO. _____

EX PARTE: ANTHONY JEROME TONEY,
Petitioner,

IN RE: ANTHONY JEROME TONEY,
Appellant

vs.

THE STATE OF ALABAMA,
Appellee.

ON APPEAL FROM THE
JEFFERSON COUNTY CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA
(CASE NO: CC 90-1091)

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE COURT OF
CRIMINAL APPEALS OF ALABAMA
(90-627)

TAMERA K. ERSKINE
ATTORNEY FOR PETITIONER
Luker, Brewer, Shores,
Umstead, Erskine & Bramer
2205 Morris Avenue
Birmingham, Alabama 35203
(205) 251-6666

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF ALABAMA:

Comes now your Petitioner, Anthony Jerome Toney, by and through his undersigned attorney, and petitions this Honorable Court for a Writ of Certiorari to issue to the Honorable Court of Criminal Appeals in the above styled cause, pursuant to Rules 39 and 41 of the *Alabama Rules of Appellate Procedure*, and as grounds therefore, shows the following:

1. That the Petitioner pled guilty to Trafficking in Cocaine, in violation of Section 13A-12-231 of the *Alabama Criminal Code*, on October 1, 1990, in the Circuit Court of Jefferson County, Alabama, in case number CC 90-1091. (RT-1 through RT-8) He was sentence by the Honorable James S. Garrett to ten years in the penitentiary, and his case was continued for a Probation Hearing. On October 3, 1990, the State filed a "Motion For Sentence Pursuant to Section 13A-12-250" of the *Code of Alabama* (1975). (CR-36 through CR-37) On January 11, 1991, the Defendant's sentence was imposed as follows: he was to serve five years in the penitentiary, pursuant to 13A-12-231, the Trafficking Section of the *Code of Alabama* (1975); and he was sentenced to five years, pursuant to 13A-12-250, the Schoolyard Statute of the *Code of Alabama* (1975). (RT-12 through RT-15) On that date, he gave oral notice of appeal, and his appeal bond was set at Three Thousand Dollars ($3000). The Defendant was declared indigent, and on April 26, 1991, this attorney was appointed to represent the Defendant on appeal. On September 26, 1991, this attorney was retained by the Defendant to represent him in the appellate process. The Defendant was represented in the Circuit Court of Jefferson County by the Honorable Anthony M. Falletta. The Defendant raised five issues for review to the Honorable Court of Criminal Appeals. They are as follows:

> 1. WHETHER THE TRIAL COURT ERRED BY FAILING TO INFORM THE DEFENDANT OF THE RANGE OF PUNISHMENT?

2. WHETHER THE TRIAL COURT ERRED BY ACCEPTING THE "IRELAND FORM" EXECUTED BY THE DEFENDANT, WHEN THE MAXIMUM RANGE OF PUNISHMENT WAS LIFE AND NOT "TWENTY YEARS" AS THE FORM INDICATED?

3. WHETHER THE TRIAL COURT ERRED IN ACCEPTING THE DEFENDANT'S GUILTY PLEA WHEN NO FACTUAL BASIS FOR THE PLEA EXISTED ON THE RECORD?

4. WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO THE MANDATORY FIVE YEARS INCARCERATION, PURSUANT TO TITLE 13A-12-250, WHEN NO FACTUAL BASIS FOR THE ENHANCEMENT WAS PROVEN?

5. WHETHER TITLE 13A-12-250 IS UNCONSTITUTIONAL AND VIOLATIVE OF THE DEFENDANT'S RIGHT OF DUE PROCESS AND EQUAL PROTECTION?

On August 23, 1991, the Court of Criminal Appeals affirmed, by memorandum, the judgment of the Circuit Court of Jefferson County, Alabama.

2. A copy of the affirmance, *by memorandum*, of the intermediate appellate court is attached to this Petition which shows the Court of Criminal Appeals number to be CR 90-627. (See Exhibit "A" attached hereto.)

3. Pursuant to Rule 40 of the *Alabama Rules of Appellate Procedure*, and the decision of the Court of Criminal Appeals in *Cox v. State*, 380 So. 2d 384 (Ala.Crim.App. 1980), Toney resubmitted his original Brief for consideration in support of his Application For Rehearing and 39(k) Motion, by reassigning the issues raised in his original Brief.

4. Pursuant to the *Alabama Rules of Appellate Procedure*, the Petitioner filed an Application For Rehearing and 39(k) Motion, assigning five errors by the intermediate appellate court, and attached additional arguments in his Application For Re-

hearing and 39(k) Motion. On September 20, 1991, the Court of Criminal Appeals overruled the Appellant's Application For Rehearing and denied his 39(k) Motion. In his 39(k) Motion, the Appellant moved the Court of Criminal Appeals to accept the following statement of facts, or in the alternative, to state facts in evidence presented upon rehearing. The Court of Criminal Appeals denied the Appellant's 39(k) Motion, and he now moves this Honorable Court to accept the following statement of facts. The Appellant has attached hereto copies of the Application For Rehearing and 39(k) Motion. (See Exhibit "B" attached hereto.)

> The Defendant, Anthony Jerome Toney, was charged in a two count indictment with the offenses of Trafficking in Cocaine in violation of Section 13A-12-231 of the *Alabama Criminal Code*, and Unlawful Possession of Cocaine in violation of Section 13A-12-212(a)(1) of the *Alabama Criminal Code*. (CR-20 and CR-21) He was represented in the Circuit Court of Jefferson County by the Honorable Anthony M. Falletta. The Defendant executed an "Ireland Form", also known as Court's Exhibit A, which showed that the range of punishment for Trafficking in Cocaine was "[f]or not less than three nor more than twenty years for such offense." (CR-33) On October 1, 1990, the Defendant entered a guilty plea to the charge of Trafficking in Cocaine and was sentenced by the Honorable James S. Garrett to ten years in the penitentiary. (RT-1 through RT-8) The case was continued for a Probation Hearing. On October 3, 1990, the State filed a "Motion for Sentence Pursuant to Section 13A-12-250" of the *Code of Alabama* (1975). (CR-36 through CR-37) On January 11, 1991, the Defendant's sentence was imposed as follows: he was to serve five years in the penitentiary, pursuant to 13A-12-231, the trafficking section of the *Code of Alabama*, (1975). In addition, he was sentence to five years, pursuant to 13A-12-250, the "Schoolyard Statute" of the *Code of Alabama*, (1975). (RT-12

> through RT-15) On that day he gave oral Notice of Appeal, and his bond was set at Three Thousand Dollars ($3000). The Defendant was declared indigent, and on April 26, 1991, Tamera K. Erskine was appointed to represent the Defendant on appeal.

5. The basis of the Petition is as follows:

A

Pursuant to Rule 39(c)(4) of the *Alabama Rules of Appellate Procedure*, the Petitioner asserts that the issues raised in Sections One through Five of his Brief on Appeal, and Section One of his Reply Brief, but not addressed by the intermediate appellate court because of the affirmance, *by memorandum*, is in direct conflict with the opinions of the Alabama Court of Criminal Appeals in *Pou v. State*, 557 So. 2d 1314 (Ala.Crim.App. 1989); and *Blair v. State*, 549 So. 2d 112 (Ala.Crim.App. 1988). The Court of Criminal Appeals' affirmance, *by memorandum*, states that:

> The appellant's asserted errors of failing to inform him of the possible range of punishment, acceptance of the guilty plea with a sufficient factual basis, improper use of the "Ireland Form" in accepting the guilty plea, and no factual basis for sentence enhancement have not been properly preserved for appellate review because appellate had not made any objection to the sentencing at the trial. . . . As to the constitutional issue raised, this Court has held in a number of cases that a constitutional issue must be raised at trial to be considered on appeal.

The five issues which the Petitioner presented on his original Brief on Appeal would constitute grounds for relief from his guilty plea. Although no objections were raised at the trial court, the Appellant asserts that it would be in the interest of judicial economy for this Court to grant his relief, and cites as grounds here and in the court below, *Pou, supra*, and *Blair, supra*.

In *Pou, supra*, the Court of Criminal Appeals found that even though it was the policy of the Court not to address issues not raised on appeal by the Appellant, the *Pou, supra* case would clearly constitute a ground for relief in a subsequent Habeas Corpus Petition. The Court state, "[i]n the interest of judicial economy, it is therefore the opinion of this Court that this cause is due to be remanded for resentencing. . . . "

In *Blair, supra*, the Court of Criminal Appeals also found that the Appellant was entitled to relief even though his issue was not preserved for appellate review. "Here, we see that this issue was not preserved and that this case is controlled by the *Biddie* case. However, we consider the sentencing error a jurisdictional one which is not subject to waiver. . . . This interpretation enables us to remand this cause for resentencing instead of inviting a Rule 20 Petition."

Pursuant to this authority, Toney urges this Honorable Court to recognize his case, because of its unique circumstances, as one which is deserving of relief. Toney's case is unique because at his plea of guilt and sentencing he was represented by the Honorable Anthony M. Falletta. After he was sentenced, he gave oral notice of appeal, and Mr. Falletta continued representation until April 26, 1991, when the Defendant was declared indigent and this attorney was appointed to represent him on appeal. By the time the undersigned attorney had been appointed to represent the Appellant, all time periods had elapsed in which the Appellant could have filed any motions for relief with the trial court, or made any necessary objections. In fact, the time had already begun to expire for the Appellant's first Brief. Toney would respectfully request that this Honorable Court rehear his case and remand it to the trial court, or in the alternative, to allow him to file an out of time motion to withdraw his plea of guilt. Should this Honorable Court entertain Toney's Petition, he reasserts the Argument for each issue as presented in his original Brief on Appeal, and attached hereto.

IN THE SUPREME COURT OF ALABAMA
S. C. NO. _____

EX PARTE: ANTHONY JEROME TONEY,
Petitioner,

IN RE: ANTHONY JEROME TONEY,
Appellant

vs.

THE STATE OF ALABAMA,
Appellee.

ON APPEAL FROM THE
JEFFERSON COUNTY CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA
(CASE NO: CC 90-1091)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE COURT OF
CRIMINAL APPEALS OF ALABAMA
(90-627)

TAMERA K. ERSKINE
ATTORNEY FOR PETITIONER
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2205 Morris Avenue
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ARGUMENT

ISSUE ONE

WHETHER THE TRIAL COURT ERRED BY FAILING TO INFORM THE DEFENDANT OF THE RANGE OF PUNISHMENT?

On October 1, 1990, the Defendant, Anthony Jerome Toney, withdrew his plea of not guilty and entered a plea of guilty before the Honorable James S. Garrett, Circuit Judge in and for Jefferson County, Alabama. Also present was Mr. Toney's attorney, the Honorable Anthony M. Falletta and Deputy District Attorney, Tammy Montgomery, representing the State. At the plea, the following colloquy was had:

> THE COURT: Mr. Toney, before we go forward with the plea in this case I want to ask you some questions about the form that I have here in my hand.
>
> Now, this form is what is known as Court's Exhibit A. This Court's Exhibit A sets out and explains to you your constitutional rights that are guaranteed to you under constitution of the state [sic] of Alabama and the constitution [sic] of the United States. Has your attorney, Mr. Falletta, gone over these rights that are set out and explained on this form and explained them to you, sir?
>
> A Yes, sir.
>
> THE COURT: Do you have any questions you would like to ask me about any of these rights that are set out and explained on this form?
>
> A No, sir.
>
> THE COURT: Is this your signature at the bottom of this form?
>
> A Yes, sir.
>
> THE CORUT [sic]: At the time that you signed this form did you understand these rights as

your attorney, Mr. Falletta, explained them to you, sir?

A Yes, sir.

THE COURT: Mr. Falletta, at the time you went over these rights with Mr. Toney, in your opinion did he have full understanding of these rights as you explained them to him?

MR. FALLETTA: Yes, sir.

THE COURT: Do you recommend we go forward with this plea in this case?

MR. FALLETTA: Yes, sir.

THE COURT: Mr. Toney, the charge that is against you at this time is the result of a grand jury indictment that was returned against you by the March 1990 grand jury. It alleges in a two count indictment the offense of trafficking in cocaine. And there is also another offense of possession of cocaine.

But the first count alleges that you did knowingly and unlawfully sell or deliver to Mark Metcalf twenty-eight grams or more of cocaine or a mixture containing cocaine, a controlled substance, on November the 3rd, of 1989 in violation of Section 13A-12-231 of the Alabama Criminal Code.

The second count of the indictment alleges that you did unlawfully possess two point one seven three grams of powder compressed material containing cocaine, in violation of Section 13A-12-212(a)(1) of the Alabama Criminal Code. Do you understand the nature of this charge and do you know what this case is about, sir?

A Yes, sir.

THE COURT: All right. To the offense of trafficking in cocaine as charged in the indictment, to that charge how do you plea[]?

A Guilty.

THE COURT: On your plea of guilty the Court does find you guilty, and I'll ask at this time if you have anything to say as why sentence should not be pronounced against you?

A No, sir.

THE COURT: All right. I'm going to — judgment and sentence of the Court you be imprisoned in the penitentiary for a term of ten years. It's further ordered that you be credited with any and all time spent incarcerated pending trial of this cause unless you were serving time for another offense.

It's further ordered that you pay a fine in the amount of fifty dollars to the Alabama Crime Victim's Compensation Commission. I know that there is another fine that will be accessed [sic] later on, but I'm going to order this for a probation report on November the 30th, 1990 at 8:30. And I'll continue on the same bond pending the hearing at that time.

Now, this form here is what is know as Court's Exhibit B. And this Court's Exhibit B asks these five questions, and it shows that there have been responses to these questions. Did you respond to these questions as shown by the check marks?

A Yes, sir.

THE COURT: Now, this form indicates that you are satisfied with the representation given to you by Mr. Falletta in representing you in this case, is that correct?

A Yes, sir.

THE COURT: All right, See y'all back on November the 30th. All right.

END OF PROCEEDINGS

(RT-1 through RT-8) At no time during this colloquy did the trial court inform the Defendant of the range of punishment. In *Carter v. State*, 277 So. 2d 896 (Ala. 1973) the Alabama

Supreme Court held, "[t]he Defendant, prior to pleading guilty, must be advised on the record of the maximum and minimum potential punishment for his crime." In *Carter, supra* a judgment entry showed that the Defendant pled guilty to the charge of kidnapping. He said he understood the "penalties involved," but there was no evidence of any further explanation of his rights, and hence, his guilty plea was not "intelligent and voluntary," even though he understood the "penalties involved." The Alabama Supreme Court reversed and remanded the case because the Defendant's statement that he know the "penalties involved" was ineffective when the exact nature of those penalties was not stated on the face of the record. The same is true in this case; at no time did the trial court, on the record, state the minimum and maximum range of punishment that the Defendant would be subjected to.

In *McNalley v. State*, 468 So. 2d 209 (Ala.Crim.App. 1985), the Court of Criminal Appeals held that "[t]he colloquy between the trial court and the Defendant was insufficient" and the Defendant's guilty plea was, therefore, "not intelligently and voluntarily entered." The transcript of the guilty plea revealed a very limited colloquy which took place between the trial judge and the Appellant. The indictment was read to him, he was informed that he had a right to a jury trial and that the State must prove guilty beyond a reasonable doubt, and that he had a right to testify in his own behalf or decline to take the stand and testify. The Court of Criminal Appeals, citing *Carter, supra*, state that "a Defendant must be informed of the maximum and minimum possible sentences as an absolute constitutional prerequisite to the acceptance of a guilty plea." The Court of Criminal Appeals found that the colloquy between the trial court and the Appellant was insufficient, and reversed the case.

Swain v. State, 485 So. 2d 1252 (Ala.Crim.App. 1986) is a case with an identical holding. In *Swain, supra* the Court of Criminal Appeals held that "because the trial court did not correctly inform the Appellant of the permissible range of punishment prior to the acceptance of the plea, we reverse

and remand." The Court, citing *Pratte v. State*, 448 So. 2d 502, 504 (Ala.Crim.App. 1984) state "[s]ince knowledge of the range of possible penalties plays an important part in an accused's decision whether or not plead guilty, the maximum and minimum sentences should be treated with reasonable precision." The record in *Swain, supra* shows that the trial court informed the Appellant that the permissible range of punishment for the offense would be term of imprisonment "for not less than one nor more than ten years." This range of punishment was incorrect since the Appellant was treated as a Habitual Offender under the Alabama Habitual Felony Offender Act. The trial court had a duty, not only to inform the Appellant of the range of punishment, but to inform him of the proper range of punishment, which it did not do.

In the case at bar, the Appellant Toney did not "knowingly and voluntarily" enter into a guilty plea. The limited colloquy set out above between the trial court and the Appellant demonstrates absolutely no reference of any kind that the Appellant was informed of the range of punishment in his case. The trial judge simply asked the Appellant if his attorney had gone over the rights contained in the Ireland Form, also known as Court's Exhibit A, and whether he had signed the form. No mention of the range of punishment is in the record, as required by *Carter, supra* and its progeny. It is clear that the trial court erred in accepting the Appellant's guilty plea, and that his plea was not knowingly and voluntarily entered into.

ARGUMENT

ISSUE TWO

WHETHER THE TRIAL COURT ERRED BY ACCEPTING THE "IRELAND FORM" EXECUTED BY THE DEFENDANT, WHEN THE MAXIMUM RANGE OF PUNISHMENT WAS LIFE AND NOT "TWENTY YEARS" AS THE FORM INDICATED?

On September 30, 1990, the Appellant, Anthony Toney, executed an "Ireland Form", also known as "Court's Exhibit A". The Ireland Form, *Ireland v. State*, 47 Ala. App. 65, 250 So. 2d 602 (1971) quotes in pertinent part:

> TO THE ABOVE NAMED DEFENDANT: This is to inform you of your rights as a Defendant in this criminal case. Under the indictment returned against you in this case by the Grand Jury of Jefferson County, Alabama, you are charged with the crime of Trafficking Cocaine which is a felony offense. In the event you plead guilty to said crime or if the jury finds that you are guilty of said crime, the law provides for punishment by imprisonment in the penitentiary for not less than three nor more than twenty years for such offense." (CR-33)

The Defendant's attorney, Anthony M. Falletta, and the Honorable James S. Garrett, Circuit Judge, also signed the form. In *Cooper v. State*, 297 So. 2d 169 (Ala.Crim.App. 1973), the Court of Criminal Appeals stated "the so-called Ireland Waiver Form is a useful document as it memorializes what occurred at the guilty plea hearing and we commend its use. But a guilty plea should not rest alone on the execution of a written form. There must be a personal interrogation by the trial judge and a record made of the Defendant's responses to the judge's inquiry . . . [t]here is no adequate substitute for demonstrating in the record at the time the plea is entered the Defendant's understanding of the nature of the charge against him and the consequence the plea connotes."

The Defendant was charged in the indictment with Trafficking in Cocaine, in violation of Section 13A-12-231 of the *Alabama Criminal Code* (1975). The indictment states in pertinent part: "Anthony Jerome Toney, alias Tony Toney, whose name is to the Grand Jury otherwise unknown, did knowingly and unlawfully sell or deliver to Mark Metcalf, 28 grams or more of cocaine or of a mixture containing cocaine, a controlled substance, on November 3, 1989, in violation of Section 13A-12-231 of the Alabama Criminal Code." Section 13A-12-231(2) states, "[a]ny person who knowingly sells, manufactures, delivers, or brings into this State, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine or of any mixture containing cocaine, described in Section 20-2-25(1), is guilty of a felony, which felony shall be known as 'Trafficking in Cocaine.' If the quantity involved: a. is 20 grams or more, but less than 500 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of Fifty Thousand Dollars ($50,000.00)" No maximum range of punishment is set out in 13A-12-231. However, in the commentary to that Section, several comments regarding the maximum punishment are laid out. In *Robinson v. State*, 474 So. 2d 685 (Ala. 1985), the Supreme Court held that "even though this Section provides for only a minimum term of imprisonment, the statute may reasonably be construed to validly authorize a maximum sentence of life imprisonment." It is clear then that the range of punishment, as set out in the Appellant's Court's Exhibit A is incorrect; the maximum is not twenty years but is, in fact, life. Toney's plea, therefore, was not knowingly and voluntarily entered into. In *Swain, supra*, the Appellant argued that her plea was not "knowingly and voluntarily" entered because she was not informed of the maximum sentence she would be called upon to serve. In *Swain, supra*, the Ireland Form that the Appellant executed showed that the maximum sentence would be ten years. However, the Appellant was a habitual felony offender, and therefore, the ten year maximum was incorrect. The Court held that the failure to inform the De-

fendant of the maximum sentence she could receive as a result of her guilty plea, rendered her plea involuntary and the case was reversed and remanded.

In *Johnson v. State*, 535 So. 2d 191 (Ala.Crim.App. 1985), the Ireland Form indicated that the range of punishment would be from ninety-nine years or life to not less that ten years. However, because a firearm or pistol was involved in this case, the Appellant's sentence should have read "not less than twenty years." The Court of Criminal Appeals, again, remanded the case for a correct determination. In *McNalley, supra*, the Court of Criminal Appeals found that the Defendant's guilty plea was not intelligently and voluntarily entered. In that case, the Ireland Form was not executed by the Defendant or his counsel. Even though it was unexecuted and could not be considered by the appellate court, it incorrectly listed the range of punishment as being "life" and not "life or not more than ninety-nine years."

The Court, citing *Carter, supra*, held that a "Defendant must be informed of maximum and minimum possible sentences as an absolute constitutional prerequisite to acceptance of a guilty plea." *Carter, supra* more fully set out in Issue One of this Brief, stood for the proposition that prior to pleading guilty a Defendant must be advised, on the record, of the maximum and minimum potential punishment for his crime. *Carter, supra* went on to state that "the 'utmost solicitude' required by *Boykin v. Alabama*, 89 S.Ct. 1709 (1969) requires a showing not only that the Defendant believed he know the range of punishment, but that his belief was accurate. The better practice is to elicit the maximum and minimum sentences from the Defendant himself, so that his knowledge thereof appears on the face of the record."

It is clear from all of these cases that Toney did not knowingly and intelligently enter into a guilty plea, because he was misinformed of the maximum possible punishment he could receive for Trafficking in Cocaine. Not only was the Ireland Form incorrect, but the trial judge never informed him of the

range of punishment and never corrected the Ireland Form in any way. Based on the above Argument and case law, the Appellant's conviction is due to be reversed.

ARGUMENT

ISSUE THREE

WHETHER THE TRIAL COURT ERRED IN ACCEPTING THE DEFENDANT'S GUILTY PLEA WHEN NO FACTUAL BASIS FOR THE PLEA EXISTED ON THE RECORD?

Mr. Toney pled guilty on October 1, 1990, and at that time the following colloquy took place:

> THE COURT: Mr. Toney, before we go forward with the plea in this case I want to ask you some questions about the form that I have here in my hand.
>
> Now, this form is what is known as Court's Exhibit A. This Court's Exhibit A sets out and explains to you your constitutional rights that are guaranteed to you under the constitution of the state [sic] of Alabama and the constitution [sic] of the United State. Has your attorney, Mr. Falletta, gone over these rights that are set out and explained on this form and explained them to you, sir?
>
> A Yes, sir.
>
> THE COURT: Do you have any questions you would like to ask me about any of these rights that are set out and explained on this form?
>
> A No, sir.
>
> THE COURT: Is this your signature at the bottom of this form?
>
> A Yes, sir.
>
> THE CORUT [sic]: At the time that you signed this form did you understand these rights as your attorney, Mr. Falletta, explained them to you, sir?

A Yes, sir.

THE COURT: Mr. Falletta, at the time you went over these rights with Mr. Toney, in your opinion did he have full understanding of these rights as you explained them to him?

MR. FALLETTA: Yes, sir.

THE COURT: Do your recommend we go forward with this plea in this case?

MR. FALLETTA: Yes, sir.

THE COURT: Mr. Toney, the charge that is against you at this time is the result of a grand jury indictment that was returned against you by the March 1990 grand jury. It alleges in a two count indictment the offense of trafficking in cocaine. And there is also another offense of possession of cocaine.

But the first count alleges that you did knowingly and unlawfully sell or deliver to Mark Metcalf twenty-eight grams or more of cocaine or a mixture containing cocaine, a controlled substance, on November the 3rd, of 1989 in violation of Section 13A-12-231 of the Alabama Criminal Code.

The second count of the indictment alleges that you did unlawfully possess two point one seven three grams of powder compressed material containing cocaine, in violation of Section 13A-12-212(a)(1) of the Alabama Criminal Code. Do you understand the nature of this charge and do you know what this case is about, sir?

A Yes, sir.

THE COURT: All right. To the offense of trafficking in cocaine as charged in the indictment, to that charge how do you plea[]?

A Guilty.

THE COURT: On your plea of guilty the Court does find you guilty, and I'll ask at this time if you have anything to say as why sentence should not be pronounced against you?

A No, sir.

THE COURT: All right. I'm going to — judgment and sentence of the Court you be imprisoned in the penitentiary for a term of ten years. It's further ordered that you be credited with any and all time spent incarcerated pending trial of this cause unless you were serving time for another offense.

It's further ordered that you pay a fine in the amount of fifty dollars to the Alabama Crime Victim's Compensation Commission. I know that there is another fine that will be accessed [sic] later on, but I'm going to order this for a probation report on November the 30th, 1990 at 8:30. And I'll continue on the same bond pending the hearing at that time.

Now, this form here is what is known as Court's Exhibit B. And this Court's Exhibit B asks these five questions, and it shows that there have been responses to these questions. Did you respond to these questions as shown by the check marks?

A Yes, sir.

THE COURT: Now, this form indicated that you are satisfied with the representation give to you by Mr. Falletta in representing you in this case, is that correct?

A Yes, sir.

THE COURT: All right. See y'all back on November the 30th. All right.

END OF PROCEEDINGS

(RT-1 through RT-8)

As can be seen from the above, it is clear that at no time was a factual basis for the plea laid out. The trial judge did not ask Mr. Toney what conduct he had participated in which led to his arrest and conviction, nor did the trial judge elicit from the State the factual basis upon which this plea rested. The

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trial court erred in not requesting this information, and the Defendant's guilty plea was not knowingly and intelligently entered into.

In *Cooper, supra* the Court of Criminal Appeals state that "there must be a personal interrogation by the trial judge and a record made of the Defendant's responses to the judge's inquiries on an entry of plea of guilty and there is no substitute for demonstrating the record at the time the plea is entered the Defendant's understanding of the nature of the charge against him and the consequence his plea connotes." The *Cooper, supra* case sets out an appendix which is a suggested inquiry that the trial judge should follow. The suggested colloquy is as follows:

BY THE COURT: Before the Court accepts your plea let me ask you some questions.

Q. Have you had an opportunity to discuss this case with your Attorney?

DEFENDANT'S ANSWER.

Q. Have you explained to your Attorney the facts of this case and what your involvement in this case was?

DEFENDANT'S ANSWER.

Q. Do you understand that you were charged in the indictment with _____ ?

DEFENDANT'S ANSWER.

Q. Do you understand that punishment for this offense is _____ to _____ years?

DEFENDANT'S ANSWER.

Q. Do you understand that if you tell me you are guilty today and your plea is accepted that it will be my duty as Judge of this Court, to set your punishment within those limits, that is between _____ and _____ years?

DEFENDANT'S ANSWER.

Q. Would you like the indictment re-read to you or futher [sic] explained to you?

DEFENDANT'S ANSWER.

Q. Do you understand that you have the right to enter a plea of not guilty and have a jury trial today if you want one?

DEFENDANT'S ANSWER.

Q. Do you understand in that event, a jury composed [ ] twelve citizens from this County would be impaneled to determine your guilty or innocence in this case?

DEFENDANT'S ANSWER.

Q. And do you also understand that at such trial you would have the right to see, hear, question and confront any witness the State might present against you?

DEFENDANT'S ANSWER.

Q. And that you would have the right to cross-examine such witnesses?

DEFENDANT'S ANSWER.

Q. Do you understand that you have the right to call into Court or subpoena into Court any witness you wish to testify in your behalf?

DEFENDANT'S ANSWER.

Q. And you could testify at your trial, but you would not have to if you choose not to?

DEFENDANT'S ANSWER.

Q. Do you understand that the lawyer now representing you will represent you throughout the trial and after the trial if necessary, or that you may have another lawyer of your own choice?

DEFENDANT'S ANSWER.

Q. Do you also understand that you have the right to plead guilty?

DEFENDANT'S ANSWER.

Q. Do you understand that if you say you are guilty here today and your plea is accepted, that you will be giving up all those rights?

DEFENDANT'S ANSWER.

Q. Do you understand that if you tell me you are guilty and your plea is accepted that I might not set your sentence until I have had an opportunity to review your past record based on a presentence investigation report prepared by the State Probation and Parole Officer?

DEFENDANT'S ANSWER.

Q. Has anybody promised to reward you or any member of your family or anybody else to get you to say you are guilty?

DEFENDANT'S ANSWER.

Q. Has anybody told you that you would receive a lighter sentence, a particular sentence, or probation or any other favor to get you to say you are guilty?

DEFENDANT'S ANSWER.

Q. Tell the Court how you plead to the indictment or charge in this case.

DEFENDANT'S ANSWER.

Q. Tell me what happened in this case. You see, I don't know any of the facts. Just tell me what happened.

DEFENDANT'S ANSWER.

AND THE COURT ADDRESSED THE DEFENDANT'S ATTORNEY.

Q. Have you conferred with and advised the Defendant concerning the facts of this case and his rights in this case?

DEFENDANT'S ATTORNEY'S ANSWER.

Q. Do you recommend that the Court accept a plea of guilty by the Defendant?

DEFENDANT'S ATTORNEY'S ANSWER.

The limited colloquy set out by the trial judge in this case is very different from that suggested by *Cooper, supra.*"

Clark v. State, 318 So. 2d 896 (Ala. 1973) furthered the Court of Criminal Appeals' view. In *Clark, supra*, the Alabama Supreme Court was even more direct. "In a plea of guilty proceedings, the Judge should undertake a factual inquiry to determine if the plea is voluntarily made with an understanding of the nature of the charge and the consequences of the plea. *Further, the Judge should be satisfied that there is a factual basis for the plea.* (emphasis added) In this case, no factual basis for the plea existed on the record, either by the State or by the Defendant. Toney's guilty plea is, therefore, void and in violation of due process. There is no factual basis from which the trial judge could have determined that the guilty plea was knowingly and voluntarily entered. The procedure followed by the trial court is directly contrary to that suggested in *Cooper, supra* and *Clark, supra.*

In *McNalley, supra* the Court of Criminal Appeals again held that the Defendant's plea was not voluntarily and intelligently entered into. In *McNalley, supra* the Court of Criminal Appeals cited *Twyman v. State*, 293 Ala. 75, 300 So. 2d 124 (1974). In *Twyman, supra* the Alabama Supreme Court held, "[a] guilty plea to be intelligently and voluntarily entered when the Ireland Form is executed and signed by a Defendant and acknowledged by the signature of the defense counsel and Circuit Judge, *provided there is other evidence in the record supporting that fact.*"

It is clear from all of these cases that the limited colloquy had between the trial judge and the Defendant was inadequate to lay out a factual basis upon which the judge could determine that the Defendant was knowingly and intelligently entering into a guilty plea. The colloquy falls below the standards of *Cooper, supra* and the Defendant's plea is void.

ARGUMENT

ISSUE FOUR

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO THE MANDATORY FIVE YEARS INCARCERATION PURSUANT TO TITLE 13A-12-250, WHEN NO FACTUAL BASIS FOR THE ENHANCEMENT WAS PROVEN?

On October 1, 1990, the Appellant pled guilty to Trafficking in Cocaine. On October 3, 1990, the State filed a Motion for the sentence to be enhanced, pursuant to Section 13A-12-250, *Code of Alabama* (1975). In the Motion, the State alleged that the sight of the alleged sale took place within three miles of Homewood Middle School. (CR-36 through CR-37) On January 14, 1991, the Court sentenced the Defendant to ten years in the penitentiary, five years mandatory under the Trafficking statute, and five years mandatory under the Schoolyard statute. Section 13A-12-250 of the *Code of Alabama* states:

> In addition to any penalties heretofore or hereafter provided by law for any person convicted of an unlawful sale of a controlled substance, there is hereby imposed a penalty of five years incarceration in the state corrections facility with no provision for probation if the sight of such unlawful sale was on the campus or within a three mile radius of the campus boundaries of any public or private school, college, university, or other education institution in this state.

There is no stipulation in the record that the Defendant and the State agreed that the sight of the sale was within three miles of a school. In addition, the trial court never required the State to prove that the sight of the alleged offense was within three miles of a school. At neither the Plea nor the Sentencing Hearing was any factual basis laid out to prove that the sale took place within three miles of the school. It was,

therefore, error for the trial court to impose the enhanced sentence without facts upon which to base it.

As this Court has stated in *Lane v. State,* 564 So. 2d 90 (Ala.Crim.App. 1990), "[t]he burden is on the State to present sufficient evidence that the accused is guilty of the charged crime." Citing *Moore v. State,* 474 So. 2d 190 (Ala.Crim.App. 1985) In the case at bar, no evidence was presented to show that the transaction took place within three miles of a school, nor is there a stipulation in the record to show such. The trial court erred in not having a factual basis upon which to impose this sentence enhancement.

In addition to the above Argument, the Appellant directs this Honorable Court's attention to the argument made in Issue Three regarding the necessity for a factual basis before a plea can be taken. In this case, it is clear that no factual basis existed on the record, or was stipulated to, by which the trial judge could enhance the sentence imposed upon Toney.